No. 77-1582

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

FELIX WALLS, PETITIONER

v.

GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

LAWRENCE G. WALLACE,
Acting Solicitor General,
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Washington, D.C. 20530.

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Petitioner contends that his petition for a writ of *habeas corpus* under 28 U.S.C. 2241 should not have been denied despite the fact that a motion to vacate his sentence under 28 U.S.C. 2255, raising the same issues, had previously been denied after an evidentiary hearing by the sentencing court.

1. After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on a two-count indictment charging that he had purchased and possessed narcotics in violation of 26 U.S.C. (1964 ed.) 4704 and 21 U.S.C. (1964 ed.) 174.[1]

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[1]Petitioner had been tried and convicted on this indictment once before, in 1970 (Pet. App. 13a). This conviction was reversed because the trial judge had viewed the scene of the offense without defendant or his counsel being present, and because defense counsel was denied an opportunity to present a summation and closing argument. *United States* v. *Walls*, 443 F. 2d 1220 (C.A. 6).

Petitioner was sentenced to concurrent terms of ten years' imprisonment on each count, the sentence to be served after completion of an existing state sentence for uttering and publishing a forged security agreement. The court of appeals affirmed. *United States* v. *Walls*, 486 F. 2d 1405 (C.A. 6), certiorari denied, 416 U.S. 983.

Petitioner thereafter filed a petition for a writ of *habeas corpus* under 28 U.S.C. 2241 in the district of his confinement (Eastern District of Illinois), alleging that the trial court had improperly sentenced him by ordering the state sentence to be completed prior to imprisonment on the federal convictions.[2] The district court denied the petition, ruling that claims of illegality in the sentence must be raised in the sentencing court under 28 U.S.C. 2255 (Pet. App. 21a). Petitioner did not appeal that judgment, but instead filed a petition in the sentencing court to vacate his sentence under 28 U.S.C. 2255. The sentencing court denied petitioner's application after a hearing (Pet. App. 22a), and the court of appeals affirmed. *Walls* v. *United States*, 538 F. 2d 331 (C.A. 6), certiorari denied, 430 U.S. 947.

Petitioner then renewed his attack on the legality of his sentence by filing another petition for a writ of *habeas corpus* under 28 U.S.C. 2241.[3] The district court held that petitioner had failed to show that the previous challenge

[2]Petitioner's federal trial began while he was free on bail pending appeal from his state convictions. The state convictions were affirmed during petitioner's federal trial. The district court's sentence on the federal convictions specifically directed that petitioner was to be delivered to state authorities for the completion of his state sentence (Pet. App. 18a). After serving one and one-half years of his state sentence, petitioner was paroled, and he is now serving his term of federal imprisonment.

[3]By this time, petitioner had been transferred to a federal prison in Indiana, and the petition was therefore filed in the United States District Court for the Southern District of Indiana.

to his sentence in the sentencing court under 28 U.S.C. 2255 had been "inadequate or ineffective" and concluded that petitioner was therefore not entitled to further review of the same claim in the *habeas corpus* proceeding (Pet. App. 27a-30a). The court of appeals affirmed, holding that petitioner's claim had already been reviewed by the sentencing court and that, in any event, petitioner's sentence was valid. *Walls* v. *Levi*, 567 F. 2d 391 (C.A. 7) (Pet. App. 24a-25a).

2. Petitioner claims that the courts below erred in denying his petition for a writ of *habeas corpus*. This claim is insubstantial.

a. The district court correctly held that petitioner may not renew his challenge to the legality of his sentence in a federal *habeas corpus* proceeding. Under 28 U.S.C. 2255, the sentencing court is the exclusive forum in which to initiate challenges to the legality of federal criminal sentences.[4] See, *e.g.*, *United States* v. *Hayman*, 342 U.S. 205; *Miller* v. *United States*, 564 F. 2d 103, 105 (C.A. 1); *Short* v. *United States*, 504 F. 2d 63 (C.A. 6). Only after the claim has been raised and rejected in the sentencing court may relief be sought by writ of *habeas corpus*; and then only in the extraordinary circumstance in which the petitioner can show that the proceedings in the sentencing court were "inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255. See *Sanders* v. *United States*, 373 U.S. 1, 14-15; *United States* v. *Hayman*, *supra*, 342 U.S. at 223.

[4]28 U.S.C. 2255 provides in part:

* * * * *

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Petitioner's challenge to the legality of his sentence was previously raised and rejected in the sentencing court (Pet. App. 22a). The claims he raised at that time were identical in substance to those involved in this case (Pet. App. 28a).[5] Petitioner has failed to demonstrate any basis for a claim that the proceedings in the sentencing court were inadequate or ineffective (Pet. App. 28a), and accordingly the district court properly dismissed the petition in this case.

b. The court of appeals also correctly ruled (Pet. App. 24a-25a) that petitioner's substantive contention lacks merit. Petitioner's argument amounts to a claim that a federal sentence may not be made consecutive to a state sentence. It has long been held, however, that a defendant convicted of federal crimes may be required to complete his term of state imprisonment prior to the commencement of the federal sentence. *E.g., Cox* v. *United States ex rel. Arron*, 551 F. 2d 1096 (C.A. 7); *Chaney* v. *Ciccone*, 427 F. 2d 363 (C.A. 8); *Casados* v. *United States*, 413 F. 2d 291 (C.A. 5).

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[5]In both cases, the controlling issue raised by petitioner was the propriety of the sentence remanding petitioner to state custody to conclude his state sentence prior to the beginning of the terms of federal imprisonment.

Petitioner asserts in this Court a claim that was not raised below. He claims (Pet. 8) that his sentence after retrial was more severe than the sentence he received after his initial trial and therefore contravened *North Carolina* v. *Pearce*, 395 U.S. 711. This claim may only be raised in the sentencing court by means of a motion pursuant to 28 U.S.C. 2255. In any event, the claim is insubstantial. The ten-year term of imprisonment imposed after retrial was identical to the term imposed after the initial trial (see Pet. App. 13a, 17a-18a). The sentence after retrial did specify that the term was to be served after completion of the state conviction that had just been upheld on appeal. But *Pearce* is not violated by the court's consideration of this circumstance that had intervened since the initial conviction (see *United States* v. *Pacelli*, 521 F. 2d 135, 141 n. 6 (C.A. 2), certiorari denied, 424 U.S. 911), particularly where, as here, the sentence imposed after the second trial involved no increase in the term of federal imprisonment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE,
*Acting Solicitor General.**

JUNE 1978.

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*The Solicitor General is disqualified in this case.

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